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State: Fla.

State Can Expect New Constitutional Challenges, Workers' Comp Expert Says: Top [2016-08-29]

One of the nation's foremost authorities on workers' compensation predicts that Florida — already facing a huge proposed rate increase over adverse court decisions — will be hit with new court rulings declaring more of its provisions unconstitutional.



John F. Burton Jr.

“I think they're in serious jeopardy,” said John F. Burton Jr., a professor emeritus at Rutgers and Cornell universities, and chairman of President Richard Nixon's 1972 National Commission on State Workmen's Compensation Laws. “I think it's going to be a very difficult time for Florida in how they figure out what they can do constitutionally to reduce their costs.”

Burton said he is flummoxed that Florida has not gone the way of every other Southeastern state in deregulating its system instead of continuing to use administered pricing.

The Florida Office of Insurance Regulation is currently pondering a proposed 19.6% rate increase by the National Council on Compensation Insurance.

Most of the proposed hike is tied to a pair of state Supreme Court rulings that NCCI projects will raise first-year costs by nearly \$700 million and create unfunded liabilities for insurance companies of at least \$1 billion.

Insurance giant AIG already has boosted its reserves by \$109 million as a result of the court rulings in [Castellanos v. Next Door Co.](#) and [Westphal v. City of St. Petersburg](#). In Castellanos, the high court said Florida's cap on attorney fees was unconstitutional because it barred reasonable fees in some cases. In Westphal, the court said capping temporary total benefits at 104 weeks was unconstitutional, and raised the limit to 260 weeks.

“They've essentially said it's hunting season and they [attorneys] can take what they want from injured workers,” David Langham, deputy chief judge of compensation claims in Florida, said last week at a regulators' roundtable at a workers' compensation conference in Orlando.

AIG boosted reserves by \$109 million even though it has just 5% of Florida's workers' comp market. If that math is correct, Langham said unfunded liabilities would be double what NCCI projects.

“The Castellanos decision has left us with more questions than answers,” Langham told two dozen other judges and regulators during last week’s Workers’ Compensation Institute annual conference. “I find NCCI’s projected \$1 billion in unfunded liability preposterous. Based on AIG’s 5% of the market, it’s going to be a \$2 billion unfunded liability.”

NCCI projects the Castellanos decision alone will necessitate a rate hike of 15%, or \$550 million.

At a rate hearing Aug. 16 hosted by the Florida Office of Insurance Regulation, an actuary and an economist who testified in favor of NCCI’s proposed hike said 19.6% might be half of what is needed because of the two Supreme Court rulings.

The economist, Mike Helvacian, [testified](#) that 2003 reforms that included caps on attorney fees based on a percentage of benefits awarded injured workers had cut comp costs by 28.6% in Florida, or nearly half of the 60% total decrease experienced in the Sunshine State over that 13-year period. Helvacian, a former NCCI executive, testified on behalf of the anti-trial-bar Florida Reform Institute.

Another actuary, Steve Alexander, who testified against the rate increase and on behalf of claimants’ attorneys, had a different story and said there was no actuarially sound way to separate the attorney fee provision from the myriad other 2003 reforms in terms of cost reductions to the system.

Burton agrees and said he’s “not convinced” that Castellanos will have that large of an impact. “I’m skeptical for a couple of reasons. NCCI has pointed out [that] a lot of other stuff went on in 2003. It was not just the attorney fee provision that was included in 2003. Separating the reduction in costs due to the attorney fee regulation and how much is due to other factors is very tricky.”

NCCI defends its numbers as actuarially sound.

Burton concedes that costs are going up in Florida but said the state remains in the middle of the national pack and is “not a runaway system like California.”

The Florida Division of Workers’ Compensation also [participated](#) in the Orlando conference and told participants that further legislative reforms would be required.

DWC Assistant Director Andrew Sabolic said stakeholders can expect one of three things next year: legislation that addresses only the unconstitutional provisions found in Castellanos and Westphal; comprehensive legislation to address other system cost drivers and administrative efficiencies; or lawmakers will “do nothing and wait until the 2018 session.”

The latter is the opposite desired by Florida’s business community, which is demanding legislative reform to offset what it perceives as greedy claimants’ attorneys benefiting from an “activist” court.

The Castellanos decision contains a sobering footnote, Burton said.

Florida’s workers’ compensation system “has become increasingly complex and difficult, if not impossible, for an injured worker to successfully navigate without the assistance of an attorney,” the footnote states.

It cites the elimination of the provision that the law be liberally construed in favor of the injured worker; a heightened standard of “major contributing cause” that applies in a majority of cases rather than the less-stringent “proximate cause” standard in civil cases; a heightened burden of proof of “clear and convincing evidence” in some types of cases; and the addition of a provision that allows the employer, and not the worker, to make an offer to settle.

Burton, who has a law degree and Ph.D. in economics from the University of Michigan, said all of those provisions easily could be declared unconstitutional.

“They have a significant impact on the ability of workers to get benefits,” he said. “I think it’s going to be really tough to amend the law to deal with costs and at the same time pass constitutional review.”

Burton said that since the early 1980s, a mass deregulation movement began sweeping through states, which went away from administered pricing and either to partial deregulation, in which individual carriers can deviate from the published manual rates with state approval, or to comprehensive deregulation, in which rating bureaus publish loss costs only, allowing insurers to set their own rates without state approval.

“Florida is one of the nine states nationally that still relies on administered pricing and is the only one of the Southeastern states that does not have a competitive rating law,” Burton told conference attendees in Orlando in a presentation titled [“National Development in Workers’ Compensation Relevant for Florida.”](#)

Should Florida go to full deregulation, the marketplace would become much more competitive, Burton said.

“It would reduce profits for the insurance industry and put pressure on them to be more efficient,” he said. “But that’s what competition is supposed to do.”

Judge Langham said the state’s future in workers’ compensation is worrisome.

“We don’t expect our Legislature to do anything in 2017,” he told fellow regulators who gathered in Orlando. “And we’ll see NCCI come back in 2017 for another significant rate increase. In my opinion, we’re gonna see carriers in trouble. I’m worried personally about some of the smaller carriers and self-insureds.”

With the potential for exploding attorney fees, “It’s going to be very much a blind-man’s-bluff game for the next 18 months before this gets straightened out,” Langham said.